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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90363; File No. SR-NYSE-2020-89]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Rule 7.35C

November 5, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 23, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.35C (Exchange-Facilitated Auctions) to (1) provide the Exchange authority to facilitate a Trading Halt Auction if a security has not reopened following a MWCB Halt by 3:30 p.m.; (2) widen the Auction Collar for an Exchange-facilitated Trading Halt Auction following an MWCB Halt; (3) provide that certain DMM Interest would not be cancelled following an Exchange-facilitated Auction; and (4) change the Auction Reference Price for Exchange-facilitated Core Open Auctions. The proposed rule change is available on the Exchange’s website at [www.nyse.com](https://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.35C (Exchange-Facilitated Auctions) to (1) provide the Exchange authority to facilitate a Trading Halt Auction<sup>3</sup> if a security has not reopened following a Level 1 or Level 2 trading halt due to extraordinary market volatility under Rule 7.12 ("MWCB Halt") by 3:30 p.m.; (2) widen the Auction Collar for an Exchange-facilitated Trading Halt Auction following a MWCB Halt; (3) provide that certain DMM Interest<sup>4</sup> would not be cancelled following an Exchange-facilitated Auction; and (4) change the Auction Reference Price for Exchange-facilitated Core Open Auctions.

The first three of these proposed changes are currently in place on a temporary basis, as described in Commentaries .01 - .03 to Rule 7.35C. The fourth of these proposed changes would be new and would replace the temporary rule set forth in Commentary .04 to Rule 7.35C.

Background

To slow the spread of COVID-19 through social-distancing measures, on March 18, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) that, beginning

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<sup>3</sup> As defined in Rule 7.35(a)(1), an "Auction" refers to the process for opening, reopening, or closing of trading of Auction-Eligible Securities on the Exchange, which can result in either a trade or a quote.

<sup>4</sup> For purposes of Auctions, the term "DMM Interest" is defined in Rule 7.35(a)(8) to mean all buy and sell interest entered by a DMM unit in its assigned securities and includes: "DMM Auction Liquidity," which is non-displayed buy and sell interest that is designated for an Auction only (see Rule 7.35(a)(8)(A)); "DMM Orders" which are orders, as defined under Rule 7.31, entered by a DMM unit (see Rule 7.35(a)(8)(B)); and "DMM After-Auction Orders," which are orders entered by a DMM unit before either the Core Open Auction or Trading Halt Auction that do not participate in an Auction and are intended instead to maintain price continuity with reasonable depth following an Auction (see Rule 7.35(a)(8)(C)).

March 23, 2020, the Trading Floor facilities located at 11 Wall Street in New York City would close and the Exchange would move, on a temporary basis, to fully electronic trading.<sup>5</sup> On May 14, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) to reopen the Trading Floor on a limited basis on May 26, 2020 to a subset of Floor brokers, subject to safety measures designed to prevent the spread of COVID-19.<sup>6</sup> On June 15, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) to begin the second phase of the Trading Floor reopening by allowing DMMs to return on June 17, 2020, subject to safety measures designed to prevent the spread of COVID-19.<sup>7</sup>

Rule 7.35C sets forth the procedures for Exchange-facilitated Auctions. The first time the Exchange facilitated any Auctions pursuant to Rule 7.35C was on March 19, 2020, when two DMM firms temporarily left the Trading Floor in connection with implementing their business continuity plans related to the COVID-19 pandemic. Beginning on March 23, 2020, when the Exchange temporarily closed the Trading Floor, the Exchange began facilitating Auctions on behalf of all DMM firms. Since June 17, 2020, when DMM firms were permitted to return staff to the Trading Floor, the Exchange has not facilitated any Auctions for DMM firms that have had staff return to the Trading Floor. During the period of March 23, 2020 through June 16, 2020, among the DMM firms, the percentage of Auctions that were facilitated by the Exchange ranged from 1% to 3.2% of the securities assigned to each DMM. During this period, the vast

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<sup>5</sup> Pursuant to Rule 7.1(e), the CEO notified the Board of Directors of the Exchange of this determination. The Exchange's current rules establish how the Exchange will function fully-electronically. The CEO also closed the NYSE American Options Trading Floor, which is located at the same 11 Wall Street facilities, and the NYSE Arca Options Trading Floor, which is located in San Francisco, CA. See Press Release, dated March 18, 2020, available here: <https://ir.theice.com/press/press-releases/all-categories/2020/03-18-2020-204202110>.

<sup>6</sup> See Securities Exchange Act Release No. 88933 (May 22, 2020), 85 FR 32059 (May 28, 2020) (SR-NYSE-2020-47) (Notice of filing and immediate effectiveness of proposed rule change).

<sup>7</sup> See Securities Exchange Act Release No. 89086 (June 17, 2020) (SR-NYSE-2020-52) (Notice of filing and immediate effectiveness of proposed rule change).

majority of Auctions were facilitated electronically by DMMs pursuant to Rules 7.35A and 7.35B.

In connection with both the market-wide volatility associated with the COVID-19 pandemic in March 2020 and the full and partial closing of the Trading Floor facilities, the Exchange added Commentaries .01, .02, .03, and .04 to Rule 7.35C<sup>8</sup> that are in effect until the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020.<sup>9</sup> These Commentaries set forth how the Exchange has been functioning during this temporary period when the Trading Floor facilities have been closed either in full or in part in connection with COVID-19.

The Exchange believes that the rules that it has added on a temporary basis to Rule 7.35C have supported the fair and orderly operation of the Exchange during both the market volatility associated with COVID-19 and the temporary period that the Trading Floor facilities have been closed either in full or in part due to COVID-19. The Exchange further believes the functionality that has been operating on a temporary basis would continue to support the fair and orderly operation of the Exchange under any circumstances where there may be either market-wide volatility or the need for the Exchange to facilitate one or more Auctions. Accordingly, the Exchange proposes that the following changes be made permanent in Exchange rules:

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<sup>8</sup> See Securities Exchange Act Release Nos. 88413 (March 18, 2020), 85 FR 16713 (March 24, 2020) (SR-NYSE-2020-19) (amending Rule 7.35C to add Commentary .01) (“First Rule 7.35C Filing”); 88444 (March 20, 2020), 85 FR 17141 (March 26, 2020) (SR-NYSE-2020-22) (amending Rules 7.35A to add Commentary .01, 7.35B to add Commentary .01, and 7.35C to add Commentary .02) (“Second Rule 7.35C Filing”); 88562 (April 3, 2020), 85 FR 20002 (April 9, 2020) (SR-NYSE-2020-29) (amending Rule 7.35C to add Commentary .03) (“DMM Interest Filing”); and 89059 (June 12, 2020), 85 FR 36911 (June 18, 2020) (SR-NYSE-2020-50) (amending Rule 7.35C to add Commentary .04) (“Fourth Rule 7.35C Filing”).

<sup>9</sup> See Securities Exchange Act Release No. 90005 (September 25, 2020), 85 FR 61999 (October 1, 2020) (SR-NYSE-2020-78) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C; and temporary rule relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020).

- Provide the Exchange with authority to facilitate a Trading Halt Auction if a security has not reopened following a MWCB Halt by 3:30 p.m. Eastern Time.
- Widen the Auction Collars for an Exchange-facilitated Trading Halt Auction following a MWCB Halt to the greater of \$0.15 or 10%.
- Allow DMM Interest to remain on the Exchange Book after an Exchange-facilitated Auction.

In addition, the Exchange proposes to change the Auction Reference Price for Exchange-facilitated Core Open Auctions, which would be new.

#### Proposed Rule Changes

##### *Exchange Authority to Facilitate a Trading Halt Auction following a MWCB Halt*

In the midst of the market-wide volatility relating to COVID-19 and before the Exchange temporarily closed the Trading Floor, the Exchange added Commentary .01 to Rule 7.35C, which provided, at the time of filing, that:<sup>10</sup>

Until May 15, 2020, to facilitate the fair and orderly reopening of securities following either a Level 1 or Level 2 trading halt due to extraordinary market volatility under Rule 7.12 (“MWCB Halt”), the CEO of the Exchange or his or her designee may determine that the Exchange will facilitate a Trading Halt Auction in one or more securities under this Rule if a security has not reopened by 3:30 p.m. If the Exchange facilitates a Trading Halt Auction following a MWCB Halt pursuant to this Commentary, the Auction Collars will be the greater of \$0.15 or 10% away from the Auction Reference Price.

Following the temporary closure of the Trading Floor, the substance of this Commentary was revised and moved to Commentary .02 to Rule 7.35C, as follows:<sup>11</sup>

If the Trading Floor facilities reopen, through trading on December 31, 2020, to

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<sup>10</sup> See First Rule 7.35C Filing, supra note 9.

<sup>11</sup> See Second Rule 7.35C Filing, supra note 9.

facilitate the fair and orderly reopening of securities following a MWCB Halt, the CEO of the Exchange or his or her designee may determine that the Exchange will facilitate a Trading Halt Auction in one or more securities under this Rule if a security has not reopened by 3:30 p.m. Eastern Time. If the Exchange facilitates a Trading Halt Auction following a MWCB Halt pursuant to this Commentary, the Auction Collars will be the greater of \$0.15 or 10% away from the Auction Reference Price.

As described in more detail in the First Rule 7.35C Filing, under Rule 7.35C, the Exchange will facilitate an Auction only if a DMM cannot facilitate an Auction for one or more securities. In support of the proposed rule change, the Exchange explained:

The Exchange continues to believe that DMM-facilitated Trading Halt Auctions following a MWCB Halt provide the greatest opportunity for fair and orderly reopenings of securities, and would therefore continue to provide DMMs an opportunity to reopen securities before effectuating an Exchange-facilitated Trading Halt Auction. The proposal would provide the Exchange with another tool during volatile markets to reopen securities before 3:50 p.m., for continuous trading to resume leading into the close. . . . The Exchange believes that specifying a time in the Rule at which the Exchange could exercise such discretion would put DMMs on notice of the time that the Exchange could begin facilitating such auctions. The Exchange further believes that it is not appropriate to provide that the Exchange would automatically facilitate reopening auctions at 3:30 p.m. There may be facts and circumstances where DMMs would be able to reopen all securities before 3:50 p.m., but that the DMM-facilitated process may not have completed by 3:30 p.m. The Exchange would take those facts and circumstances into account before invoking the proposed relief. Exchange staff would communicate with the impacted DMMs verbally on the Floor during such

times, and therefore the DMMs would be on notice of whether the Exchange would invoke this relief, and for which securities.

The Exchange continues to believe that the ability for the Exchange to facilitate a Trading Halt Auction following a MWCB Halt if a security has not reopened by 3:30 p.m. would promote the fair and orderly reopening of one or more securities so that continuous trading may resume leading into the close. Accordingly, the Exchange proposes that the relief described above should be made a permanent part of Rule 7.35C. To effect this change, the Exchange proposes to amend 7.35C to add new subparagraph (a)(4) as follows, which is based on current Commentary .02 to Rule 7.35C without any substantive differences:

The CEO of the Exchange, or his or her designee, may determine that the Exchange will facilitate a Trading Halt Auction in one or more securities under this Rule if a security is subject to either a Level 1 or Level 2 trading halt due to extraordinary market volatility under Rule 7.12 (“MWCB Halt”) and has not reopened by 3:30 p.m. Eastern Time.

The Exchange further proposes to delete Commentary .02 to Rule 7.35C, which would be replaced by proposed Rule 7.35C(a)(4).

There are no technology changes associated with this proposed rule change and the Exchange would be able to implement it immediately upon approval of this proposed rule change.

*Wider Auction Collars for a Trading Halt Auction Following a MWCB Halt*

As noted above, as set forth in Commentary .01(a) to Rule 7.35C,<sup>12</sup> the Exchange also widened the Auction Collars for an Exchange-facilitated Trading Halt Auction following a

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<sup>12</sup> Commentary .01(a) to Rule 7.35C currently provides that: “For a temporary period that begins March 23, 2020, when the Trading Floor facilities have been closed pursuant to Rule 7.1(c)(3), and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020: (a) The Auction Collar for a Trading Halt Auction following a either a Level 1 or Level 2 trading halt due to

MWCB Halt to the greater of \$0.15 or 10% away from the Auction Reference Price. Absent this temporary relief, the Auction Collars for all Exchange-facilitated Trading Halt Auctions is the greater of \$0.15 or 5% away from the Auction Reference Price.

As described in the First Rule 7.35C Filing, the widening of the Auction Collars was designed to provide the Exchange with more flexibility to respond to the then unprecedented market-wide declines that resulted from the ongoing spread of COVID-19 at that time if the Exchange were to facilitate a Trading Halt Auction following a MWCB Halt. The Exchange cannot predict if and when the U.S. equities market will experience market-wide declines that would trigger a MWCB Halt again. However, if such market-wide volatility were to occur, the Exchange believes that the widened Auction Collars would promote fair and orderly reopenings following a MWCB Halt by providing a wider price range at which the Exchange could facilitate such a reopening.

To effect this change, the Exchange proposes to amend Rule 7.35C(b)(3)(A)(ii) to provide as follows (proposed new text italicized), which is based on current Commentary .01 to Rule 7.35C without any substantive differences:

The Auction Collar for the Trading Halt Auction will be based on a price that is the greater of \$0.15 or 5% away from the Auction Reference Price for the Trading Halt Auction, provided that, the Auction Collar for a Trading Halt Auction following a MWCB Halt will be the greater of \$0.15 or 10% away from the Auction Reference Price.

The Exchange further proposes to delete Commentary .01 to Rule 7.35C, which would be replaced by the proposed amendment to Rule 7.35C(b)(3)(A)(ii).

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extraordinary market volatility under Rule 7.12 (“MWCB Halt”) will be the greater of \$0.15 or 10% away from the Auction Reference Price.”



There are no technology changes associated with this proposed rule change and the Exchange would be able to implement it immediately upon approval of this proposed rule change.

*DMM Interest and Exchange-Facilitated Auctions*

As set forth in Rule 7.35C(a)(1), if the Exchange facilitates an Auction, DMM Interest would not be eligible to participate in such Auction and previously-entered DMM Interest would be cancelled. When a DMM cannot facilitate an Auction because the DMM unit is experiencing a system issue that prevents it from communicating with Exchange systems, cancelling DMM Interest following an Exchange-facilitated Auction would help ensure that DMM Interest that may be at stale prices does not participate in trading on the Exchange. On the other hand, by cancelling DMM Interest when the DMM units' systems are operating normally, DMMs may be limited in their ability to maintain price continuity with reasonable depth, i.e., provide passive liquidity at the Exchange best bid and offer and at depth, immediately following an Exchange-facilitated Auction.

After a period of operating Exchange-facilitated Auctions, the Exchange identified a way to provide DMMs with a greater opportunity to provide passive liquidity immediately following an Auction, thereby dampening volatility, while still limiting DMM risk. To effect this change, the Exchange added Commentary .03 to Rule 7.35C, which provides that for the temporary period that begins on April 6, 2020 and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020, if the Exchange facilitates an Auction, DMM Interest (i) will not be eligible to participate if such Auction results in a trade, and will be eligible to participate if such Auction results in a quote, and (ii) will not be cancelled unless the limit price of such DMM Interest would be priced through the Auction Price

or Auction Collars, as applicable, or such DMM Interest would be marketable against other unexecuted orders.<sup>13</sup>

The Exchange proposes to make permanent the changes to how Exchange-facilitated Auctions function, as described in Commentary .03 to Rule 7.35C. By making this functionality permanent, such rules would continue to apply both during the continuation of the current Trading Floor closure and if the Exchange were to facilitate Auctions any time after the Trading Floor fully reopens.

To effect this change, the Exchange proposes to amend 7.35C(a)(1) as follows (new text italicized, deleted text bracketed):

If the Exchange facilitates an Auction, DMM Interest will not be eligible to participate [in]if such Auction results in a trade, and will be eligible to participate if such Auction results in a quote[ and previously-entered DMM Interest will be cancelled].

This proposed rule change would make permanent the temporary functionality set forth in paragraph (a)(1) to Commentary .03.

With this change, DMM Interest would not participate in any Exchange-facilitated Auctions that would result in a trade. This is how DMM Interest currently functions when the Exchange facilitates an Auction pursuant to either Rule 7.35C(a)(1) or Commentary .03 to Rule 7.35C. Based on experience operating pursuant to Commentary .03 to Rule 7.35C, the Exchange believes that this functionality should continue permanently when the Exchange facilitates an Auction, including, for example, when the Trading Floor is open but the DMM is unable to facilitate an Auction because of a systems or technical issue.

More specifically, when a DMM facilitates an Auction that results in a trade, the DMM determines whether to participate on the buy or sell side and, based on that direction from the

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<sup>13</sup> See DMM Interest Filing, supra note 9.

DMM, DMM Orders that do not participate in the Auction and that would lock or cross other orders, which would include other DMM Orders, will be cancelled.<sup>14</sup> If the DMM has entered both buy and sell interest in advance of the Auction and the Exchange facilitates the Auction, the DMM would not be able to control whether the DMM's buy or sell interest would participate in a trade and the Exchange would not have that instruction from the DMM of which side of the market that the DMM would participate. As a result, there may be crossing DMM Interest that could result in a wash-sale trade that would not have occurred if the DMM had facilitated the Auction. Excluding DMM Interest from participating in an Exchange-facilitated Auction that results in a trade eliminates the potential for a wash-sale trade. In addition, the Exchange believes it promotes fair and orderly Exchange-facilitated Auctions that result in a trade to exclude DMM Interest from participating in such Auctions, because if a DMM's buy or sell interest does not reflect up-to-date prices, it could impact pricing of the Auction.

By contrast, the Exchange believes that the proposed change for DMM Interest to participate in an Exchange-facilitated Auction that results in a quote would promote fair and orderly markets. This proposed change is consistent with Commentary .03(a)(1) to Rule 7.35C, but differs from current Rule 7.35C(a)(1). A security opens on a quote if there is no buy interest willing to trade with sell interest at the same price. The Exchange believes that under such circumstances, including DMM Interest in the Exchange's quote would assist the DMMs in meeting their obligation to maintain a two-sided quote as well as to maintain continuity and depth in their assigned securities.<sup>15</sup> Accordingly, the Exchange believes that making this change permanent would promote fair and orderly markets in connection with Exchange-facilitated Auctions that result in a quote.

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<sup>14</sup> See Rule 7.35A(h)(3)(C) (providing that after a Core Open or Trading Halt Auction, better at-priced DMM Orders that do not receive an allocation and that lock or cross other unexecuted orders and buy and sell better-priced DMM Orders will be cancelled after the Auction Processing Period concludes).

<sup>15</sup> See Rule 104(f)(2).

The final element of the proposed change to Rule 7.35C(a)(1) is that DMM Interest would no longer be automatically cancelled after an Exchange-facilitated Auction. The Exchange believes that this proposed change would assist DMMs in meeting their obligation, as required by Rule 104(f)(2), to provide passive liquidity in order to maintain continuity with reasonable depth in their assigned securities immediately following a Core Open Auction or Trading Halt Auction that was facilitated by the Exchange. In advance of an Auction, DMMs can enter DMM Orders, which if not traded in an Auction, would be part of the DMM Interest on the Exchange Book after the Auction. In addition, DMMs can enter DMM After-Auction Orders, which do not participate in Auctions and are specifically designed to assist the DMMs to maintain passive liquidity on the Exchange immediately following an Auction, which supports their ability to maintain continuity with reasonable depth immediately following an Auction. If DMM Interest is not automatically cancelled following an Exchange-facilitated Auction, the DMM would be better able to timely meet these obligations by ensuring that passive liquidity remains on the Exchange Book immediately following an Auction.

The Exchange believes that there remain circumstances when DMM Interest should be cancelled following an Exchange-facilitated Auction. As proposed, the Exchange would cancel unexecuted DMM Interest under the same circumstances that unexecuted orders of other member organizations would be cancelled following such Auctions.

To effect this change, the Exchange proposes to amend Rule 7.35C(g)(1), which currently describes which unexecuted orders would be cancelled if a security opens or reopens on a trade via an Exchange-facilitated Auction, and Rule 7.35C(g)(2), which currently describes which unexecuted orders would be cancelled if a security opens or reopens on a quote that is above (below) the upper (lower) Auction Collar via an Exchange-facilitated Auction. The Exchange proposes that these two subparagraphs would be replaced with the following text to incorporate that under the same circumstances, DMM Interest would similarly be cancelled (proposed new text italicized):

(1) If a security opens or reopens on a trade, Market Orders (including sell short Market Orders during a Short Sale Period) and Limit Orders, including DMM Interest, with a limit price that is better-priced than the Auction Price and were not executed in the applicable Auction will be cancelled.

(2) If a security opens or reopens on a quote that is above (below) the upper (lower) Auction Collar, Market Orders (including sell short Market Orders during a Short Sale Period) and Limit Orders, including DMM Interest, with a limit price that is better-priced than the upper (lower) Auction Collar will be cancelled before such quote is published.

These proposed rule changes would make permanent the temporary functionality set forth in paragraphs (b)(1) and (2) to Commentary .03.

The Exchange further believes that if previously-entered DMM Interest would be marketable against either other DMM Interest or contra-side unexecuted orders, such DMM Interest should be cancelled. For example, if for a security, the Auction Reference Price is \$10.00, the lower Auction Collar is \$9.00 and the upper Auction Collar is \$11.00, and the orders on the Exchange Book in advance of the Auction are as follows:

- Order 1 - Buy DMM Order 1000 shares at \$10.05
- Order 2 - Sell DMM Order 1000 shares at \$10.00
- Order 3 - Buy DMM Order 1000 shares at \$10.02
- Order 4 - Sell Limit Order at \$10.03,

the orders in this example would be processed as follows in an Exchange-facilitated Auction:

- Order 1 would be cancelled (because DMM Interest would not be eligible to participate in an Auction trade, and here, Order 1 is marketable with Orders 2 and

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- Order 2 would be cancelled (because DMM Interest would not be eligible to participate in an Auction trade, and here Order 2 is marketable with Order 3), and
- Order 3 would not be cancelled because it is no longer marketable with any other interest, i.e., it no longer locks or crosses the price of any other contra-side interest in the Exchange Book. Order 3 would therefore be included in the opening quote.

This Exchange-facilitated Auction would result in the following quote: \$10.02 (Order 3 - DMM Order) x \$10.03 (Order 4 - Limit Order).

To effect this change, the Exchange proposes new subparagraph (g)(3) to Rule 7.35C to specify the additional circumstances when DMM Interest would be cancelled, as follows:

The Exchange will cancel DMM Interest that is marketable against contra-side unexecuted orders. If the contra-side unexecuted order against which such DMM Interest is marketable is DMM Interest, the DMM Interest with the earlier working time will be canceled.

This proposed rule change would make permanent the temporary functionality set forth in paragraph (b)(3) to Commentary .03.

The Exchange believes that these proposed rule changes would promote fair and orderly markets whenever the Exchange facilitates an Auction under Rule 7.35C -- under any circumstance -- by supporting DMMs in maintaining continuity with reasonable depth in their assigned securities immediately following an Exchange-facilitated Core Open Auction or Trading Halt Auction that was facilitated by the Exchange.

The Exchange proposes that, with these proposed changes to Rules 7.35C(a)(1) and (g), Commentary .03 to Rule 7.35C would be deleted in its entirety.

In further support of making the functionality set forth in Commentary .03 to Rule 7.35C permanent, the Exchange notes that after the Exchange implemented that Commentary, the Exchange observed improved performance relating to Exchange-facilitated Auctions.

- For the period March 23, 2020 to April 3, 2020, 4.9% of all Core Open Auctions were facilitated by the Exchange. For the period April 6, 2020 through June 16, 2020, the Exchange facilitated only 2% of all Core Open Auctions. In addition, the percentage of Exchange-facilitated Core Open Auctions that were bound by an Auction Collar decreased from 1.3% from the pre-April 6, 2020 period, to 0.58% in the April 6, 2020 - June 16, 2020 period.
- In addition, the Exchange observed that after April 6, 2020, Exchange-listed securities experienced reduced volatility in the first half hour of trading. The Exchange uses a quote-based metric to measure volatility in securities,<sup>16</sup> and based on that metric, volatility in Exchange-listed securities between the period of April 6, 2020 and June 16, 2020 was 28.4% lower than the same measure between March 23, 2020 and April 3, 2020. In addition, the Exchange further observed that between these two periods, the difference between the Core Open Auction Price and the subsequent five-minute VWAP dropped by 31.3%.

For DMM firms that have already returned staff to the Trading Floor, this proposed change has limited application because the Exchange has not facilitated any Auctions on behalf of those firms since June 16, 2020. In addition, the Exchange anticipates that once the Trading Floor facilities open in full to DMMs, and all DMM firms have staffing on the Trading Floor, the need for Exchange-facilitated Auctions would be obviated, and the Exchange will revert to pre-

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<sup>16</sup> As described in an Exchange blog post, this metric is calculated using second-to-second “quote returns,” which is calculated by averaging the midpoints of all NBBO updates for a security within each second of the day from 9:35 a.m. to 4:00 p.m., and then calculating the percentage rate of return of these average quote midpoints from one second to the next. The variance of returns are then calculated in aggregated time periods (e.g., 5-minute buckets) and annualized from seconds to 6.5 hour trading days to 252 trading days in the years. Finally, the Exchange takes the square root of the annualized variance in the aggregated periods, which creates the Exchange’s quote volatility metric. See NYSE Data Insights, Introducing Quote Volatility (QV) - a new metric to measure price volatility, available here: <https://www.nyse.com/data-insights/introducing-quote-volatility-qv-a-new-metric-to-measure-price-volatility>.

pandemic rates of Exchange-facilitated Auctions, which were none. Accordingly, the proposed changes to Rule 7.35C will likely have limited application and would be available as a business continuity functionality should DMMs be unable to facilitate an Auction in one or more securities, for any reason.

There are no technology changes associated with this proposed rule change and the Exchange would be able to implement it immediately upon approval of this proposed rule change.

*Updated Auction Reference Price for Exchange-Facilitated Core Open Auctions*

For Exchange-facilitated Auctions, the Exchange determines an Auction Price based on the Indicative Match Price for a security, which is bound by Auction Collars.<sup>17</sup> Rule 7.35C(b)(1) specifies the Auction Reference Price that is used for determining Auction Collars for Exchange-facilitated Core Open Auctions, which is the Imbalance Reference Price, as determined under Rule 7.35A(e)(3).<sup>18</sup> Currently, the Auction Collars for the Core Open Auction are at a price that is the greater of \$0.15 or 10% away from the Auction Reference Price.

On June 4, 2020, the Exchange added Commentary .04 to Rule 7.35C to provide that the Auction Collars for Exchange-facilitated Core Open Auctions would be the greater of \$1.00 or 10% away from the Auction Reference Price.<sup>19</sup> The Exchange added this Commentary to reduce the number of securities subject to a collared Exchange-facilitated Core Open Auction.<sup>20</sup> The

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<sup>17</sup> See Rule 7.35C(b)(2).

<sup>18</sup> See Rule 7.35C(b)(3)(A)(i). Pursuant to Rule 7.35A(e)(3), the Imbalance Reference Price for a Core Open Auction is the Consolidated Last Sale Price, unless a pre-opening indication has been published. Pursuant to Rule 7.35(a)(11)(A), the term “Consolidated Last Sale Price” means the most recent consolidated last-sale eligible trade in a security during Core Trading Hours on that trading day, and if none, the Official Closing Price from the prior trading day for that security.

<sup>19</sup> See Fourth Rule 7.35C Filing, *supra* note 9. Commentary .04 is in effect for a temporary period that began on June 4, 2020 and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020.

<sup>20</sup> In the Fourth Rule 7.35C Filing, *id.*, the Exchange explained that for the period while the Trading Floor had been temporarily closed preceding that filing, the Exchange had facilitated 2.35% of the Core Open Auctions and that approximately 30% of the



Exchange observed that from June 4, 2020 up to June 17, 2020, when DMMs returned staff to the Trading Floor,<sup>21</sup> even with the widened Auction Collars, if there were significant overnight market-wide volatility, Exchange-facilitated Core Open Auctions had a greater likelihood of being subject to an Auction Collar. For example, for that same June 4 - June 16 period, when the price of the SPDR S&P 500 ETF Trust (“SPY”)<sup>22</sup> moved over 1% from the prior day’s close, 1.4% of the Exchange-facilitated Core Open Auctions were subject to an Auction Collar, as compared to only .5% of the Exchange-facilitated Core Open Auctions being subject to an Auction Collar when SPY moved less than 1% from the prior day’s close.

The Exchange believes that adjusting the Auction Reference Price to align more closely with the anticipated price of the Core Open Auction, rather than widening the Auction Collars, would reduce the potential for an Exchange-facilitated Core Open Auction to be subject to an Auction Collar on all trading days, including when there is significant overnight market-wide volatility. Accordingly, rather than providing for a wider Auction Collar, as set forth in Commentary .04 to Rule 7.35C, the Exchange proposes to amend Rule 7.35C to update how the Auction Reference Price for Exchange-facilitated Core Open Auctions would be determined. Specifically, the Exchange proposes to determine Auction Reference Prices for Exchange-facilitated Core Open Auctions in the same manner that the Exchange’s affiliates, NYSE Arca,

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Exchange-facilitated Core Open Auctions had an Indicative Match Price that was subject to an Auction Collar, and approximately 50% of these collared Exchange-facilitated Core Open Auctions were in securities trading at prices under \$10.00. The Exchange further noted that if Auction Collars had not been applied to these securities priced under \$10.00, they would have opened at a price between \$0.15 and \$1.00 away from the Auction Reference Price.

<sup>21</sup> As noted above, the Exchange has not facilitated any Auctions for any of the DMM firms that have returned staff to the Trading Floor.

<sup>22</sup> Because SPY is priced based on the securities included in the S&P 500 Index, the Exchange believes that SPY’s price as compared to its prior day’s closing price is indicative of the scope of market-wide volatility leading into the open of the Core Trading Session.

Inc. (“NYSE Arca”) and NYSE American LLC (“NYSE American”), determine the Auction Reference Price for their electronic Core Open Auctions.

NYSE Arca Rule 7.35-E(a)(8)(A) and NYSE American Rule 7.35E(a)(8)(A) both provide that the Auction Reference Price for Core Open Auctions on those exchanges is, “[t]he midpoint of the Auction NBBO or, if the Auction NBBO is locked, the locked price. If there is no Auction NBBO, the prior day’s Official Closing Price.” The NYSE Arca and NYSE American rules define the term “Auction NBBO” to mean:

An NBBO that is used for purposes of pricing an auction. An NBBO is an Auction NBBO when (i) there is an NBB above zero and NBO for the security and (ii) the NBBO is not crossed. In addition, for the Core Open Auction, an NBBO is an Auction NBBO when the midpoint of the NBBO when multiplied by a designated percentage, is greater than or equal to the spread of that NBBO. The designated percentage will be determined by the Exchange from time to time upon prior notice to ETP Holders.<sup>23</sup>

The Exchange proposes to amend Rule 7.35C(b)(1) to provide that the Auction Reference Price for an Exchange-facilitated Core Open Auction would be: “The midpoint of the Auction NBBO or, if the Auction NBBO is locked, the locked price. If there is no Auction NBBO, the Official Closing Price from the prior trading day.” This rule text is based on NYSE Arca Rule 7.35-E(a)(8)(A) and NYSE American Rule 7.35E(a)(8)(A) without any differences.

The Exchange further proposes to amend Rule 7.35(a) to add a definition for the term “Auction NBBO,” which would similarly be based on the definition of that term in the NYSE Arca and NYSE American rules without any substantive differences, as follows:

“Auction NBBO” means an NBBO that is used for purposes of pricing an auction.

An NBBO is an Auction NBBO when (i) there is an NBB above zero and NBO

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<sup>23</sup> See NYSE Arca Rule 7.35-E(a)(5) and NYSE American Rule 7.35E(a)(5).

for the security and (ii) the NBBO is not crossed. In addition, for the Core Open Auction, an NBBO is an Auction NBBO when the midpoint of the NBBO when multiplied by a designated percentage, is greater than or equal to the spread of that NBBO. The designated percentage will be determined by the Exchange from time to time upon prior notice to member organizations.

The Exchange proposes to add the term “Auction NBBO” as Rule 7.35(a)(5) and make non-substantive changes to renumber the definitions currently set forth in Rules 7.35(a)(5) - (12) as Rules 7.35(a)(6) - (13).

Because there are technology changes associated with this proposed rule change, the Exchange proposes to announce the implementation date of this change by Trader Update. The Exchange anticipates that the Exchange will implement this technology change in the first quarter of 2021.

To provide continuity, the Exchange further proposes to amend Commentary .04 to Rule 7.35C to provide that such Commentary would end on the earlier of when the Exchange implements its technology change to use the midpoint of the Auction NBBO as the Auction Reference Price for the Core Open Auction or after the Exchange closes on December 31, 2020. With this proposed rule change, the widened Auction Collars specified in that Commentary would continue to be operative until such time that the proposed changes to the Auction Reference Price for Exchange-facilitated Core Open Auctions have been approved and implemented.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>24</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>25</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles

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<sup>24</sup> 15 U.S.C. 78f(b).

<sup>25</sup> 15 U.S.C. 78f(b)(5).

of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the rules that it added on a temporary basis to Rule 7.35C have supported the fair and orderly operation of the Exchange during both the market volatility associated with COVID-19 and the temporary period that the Trading Floor facilities have been closed either in full or in part due to COVID-19. The Exchange further believes the functionality that has been operating on a temporary basis would continue to support the fair and orderly operation of the Exchange under any circumstances where there may be either market-wide volatility or the need for the Exchange to facilitate one or more Auctions.

*Exchange Authority to Facilitate a Trading Halt Auction following a MWCB Halt*

The Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system to provide the Exchange with authority to facilitate a Trading Halt Auction following a MWCB Halt. The Exchange continues to believe that DMM-facilitated Trading Halt Auctions following a MWCB Halt provide the greatest opportunity for fair and orderly reopenings of securities, and would therefore continue to provide DMMs an opportunity to reopen securities before effectuating an Exchange-facilitated Trading Halt Auction. The proposal would provide the Exchange with another tool during volatile markets to reopen securities before 3:50 p.m. so that continuous trading may resume before leading into the close. The Exchange further believes that it is not appropriate to provide that the Exchange would automatically facilitate reopening auctions at 3:30 p.m. There may be facts and circumstances where DMMs would be able to reopen all securities before 3:50 p.m., but that the DMM-facilitated process may not have completed by 3:30 p.m. The Exchange would take those facts and circumstances into account before invoking the proposed relief.

*Wider Auction Collars for a Trading Halt Auction Following a MWCB Halt*

The Exchange believes that it would remove impediments to and perfect the mechanism

of a free and open market and a national market system to widen the Auction Collars for an Exchange-facilitated Trading Halt Auction following a MWCB Halt. Such widened Auction Collars would provide the Exchange with more flexibility to respond to any market-wide declines that may continue following a MWCB Halt if the Exchange were to facilitate a Trading Halt Auction following such halt. The Exchange cannot predict if and when the U.S. equities market will experience market-wide declines that would trigger a MWCB Halt again. However, if such market-wide volatility were to occur, the Exchange believes that the widened Auction Collars would promote fair and orderly reopenings following a MWCB Halt by providing a wider price range at which the Exchange could facilitate such a reopening, thereby allowing more buy and sell interest to participate in such Auction.

#### *DMM Interest and Exchange-Facilitated Auctions*

As noted above, beginning March 19, 2020, the Exchange began facilitating auctions as provided for under Rule 7.35C for the first time, and then, beginning March 23, 2020, when the Trading Floor was temporarily closed to reduce the spread of COVID-19, began facilitating Auctions on behalf of all DMM firms. Based on that experience, the Exchange added Commentary .03 to Rule 7.35C, which is in effect only for a temporary period while the Trading Floor is closed. The Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system to make the changes described in Commentary .03 to Rule 7.35C permanent because it would allow DMMs to maintain continuity with reasonable depth in their assigned securities immediately following an Exchange-facilitated Auction.

As described above, the Exchange is proposing that DMM Interest would continue to not participate in an Exchange-facilitated Auction that results in a trade. As noted above, under both the current Rule and temporary Commentary .03, DMM Interest does not participate in an Exchange-facilitated Auction that results in a trade in part to prevent wash-trade sales of previously-entered DMM buy and sell interest and therefore reduces DMM units' risk. It also

protects the fair and orderly operation of such Auctions because such DMM Interest may be at stale prices, and therefore could impact pricing of the Auction in a manner that does not reflect up-to-date trading interest. For this reason, the Exchange believes it would continue to promote fair and orderly Auctions for DMM Interest not to participate in an Exchange-facilitated Auction that results in a trade.

By contrast, the Exchange believes that the proposed change that DMM Interest would be included in an Exchange-facilitated Auction that results in a quote would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote fair and orderly resumption of trading by allowing DMM Interest to be considered as part of the opening quote. A security only opens on a quote when there are no buy and sell orders that can be crossed at a single price. Accordingly, when a security opens on a quote, the DMM has an immediate obligation to maintain a two-sided quote and to provide continuity and depth. Including DMM interest in an Exchange-facilitated Auction that results in a quote would assist DMMs in meeting those obligations.

The Exchange believes it would remove impediments to and perfect the mechanism of a free and open market and a national market system not to automatically cancel DMM Interest following an Exchange-facilitated Auction because it would provide DMMs with the opportunity to provide passive liquidity immediately following an Exchange-facilitated Auction, thereby reducing volatility while still limiting DMM risk. Similarly, the Exchange believes that because DMM Interest would not be participating in an Exchange-facilitated Auction that results in a trade, it would remove impediments to and perfect the mechanism of a free and open market and a national market system to cancel DMM Interest that would be marketable against unexecuted orders because, if not cancelled, such interest could trade at a price that would not be consistent with the Auction Price or opening or reopening quote determined in the Exchange-facilitated Auction. The proposed changes would also remove impediments to and perfect the mechanism of a free and open market because DMM Interest that, following an Exchange-facilitated

Auction, would be priced through the Auction Price or Auction Collars, as applicable, would be cancelled in the same manner that other unexecuted orders would be cancelled.

The Exchange further believes that the proposed changes to Rules 7.35C(a) and (g) would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Exchange observed improved performance following Exchange-facilitated Auctions after the Exchange implemented Commentary .03 to Rule 7.35C. Accordingly, should circumstances ever arise again that would require the Exchange to facilitate any Auctions, which, based on pre-pandemic experience, would likely be rare, the Exchange believes that these proposed changes would improve the performance of Exchange-facilitated Auctions by enabling better engagement by the DMMs in both the Auction and the immediate after-market while still limiting DMM risk.

*Updated Auction Reference Price for Exchange-Facilitated Core Open Auctions*

The Exchange believes that the proposal to change the Auction Reference Price for Exchange-facilitated Core Open Auctions would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would reduce the potential number of securities that would be subject to a collared Exchange-facilitated Core Open Auction, including when there is significant overnight market-wide volatility.

Commentary .04 to Rule 7.35C sought to achieve this goal by widening the Auction Collars, but as noted above, these temporary widened Auction Collars would not prevent an Exchange-facilitated Core Open Auction from being subject to an Auction Collar when there has been significant overnight market-wide volatility. The Exchange believes that aligning the Auction Reference Price more closely with the anticipated opening price by using the midpoint of the Auction NBBO as the Auction Reference Price (or Official Closing Price of the prior Trading Day if no Auction NBBO) would reduce the potential for an Exchange-facilitated Core Open Action to be subject to an Auction Collar on all trading days, including when there is significant overnight market-wide volatility. The Exchange further believes that this proposed rule change

would reduce the potential number of securities that would open at a price that may not represent the current value of the security due to unfilled marketable auction interest, while still preserving investor protections by preventing significantly dislocated openings. This proposed rule change would therefore promote the fair and orderly operation of Exchange-facilitated Core Open Auctions by allowing such securities to open at a price that is consistent with the buy and sell interest in the security, which would also allow more buy and sell interest to participate in such Auction.

The Exchange notes that this proposed change is not novel and is based on how NYSE Arca and NYSE American determine the Auction Reference Price for their respective electronic Core Open Auctions. Accordingly, this proposed change would align how Auction Reference Prices are determined for electronic Exchange-facilitated Auctions across NYSE, NYSE Arca, and NYSE American.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather would make permanent the Exchange's temporary Commentaries .01 -.03 to Rule 7.35C, which have been in effect for a temporary period while the Trading Floor is temporarily closed due to COVID-19. This proposed rule change is designed to provide the Exchange with additional tools for when it facilitates an Auction, including by allowing for an Exchange-facilitated Trading Halt Auction following a MWCB Halt so that a security can be reopened before leading into the close, providing the DMMs with additional functionality to allow them to maintain price continuity with reasonable depth in their assigned securities following an Exchange-facilitated Auction, and aligning the Auction Reference Price for an Exchange-facilitated Core Open Auction with the Auction Reference Price used for NYSE Arca and NYSE American electronic Core Open Auctions. More specifically, the proposed rule change does not implicate any intramarket



competition concerns because the only market participants on the Exchange with the obligation to facilitate Auctions are DMMs, and all DMMs would be subject to this rule change. The proposed rule change does not implicate any intermarket competition concerns because it relates to how the Exchange would facilitate Auctions in Exchange-listed securities.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register, or such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-89 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-89. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-89, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>26</sup> 17 CFR 200.30-3(a)(12).